SUPREME COURT OF THE UNITED STATES

ANTHONY JAMES MANN *v.* OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 87-7101. Decided October 3, 1988

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not take this view, I would grant the petition in order to resolve the question whether inflammatory and prejudicial photographs of the victim's body introduced during the guilt phase of a capital trial, and subsequently reincorporated during the sentencing phase, violate the accused's constitutional right to a reliable sentencing determination. The Court granted certiorari on a very similar question last Term in *Thompson* v. *Oklahoma*, —— U. S. —— (1988), but did not decide it because the Court found that the petitioner in that case, who was 15 years old at the time of the offense, could not be subjected to the death penalty under the Eighth and Fourteenth Amendments. *See id.*, at —— n. 48 (plurality opinion).

The petitioner here, an adult, was convicted of first-degree murder and sentenced to death for his role in the same murder which gave rise to *Thompson*, *supra*. During the guilt phase of the petitioner's trial, the prosecution introduced two color photographs of the victim's body that were taken after the body had been retrieved from a river one month after the murder. These photographs were reincorporated by the

prosecution during the sentencing phase of the trial. On direct appeal, the Oklahoma Court of Criminal Appeals found that the trial court erred in admitting the photographs due to their "gruesome" and "inordinately grisley [sic]" nature. *Mann* v. *Oklahoma*, 749 P. 2d 1151, 1156 (Okla. Cr. App. 1988). The court concluded, however, that the error was harmless because "the case against appellant was sufficient" without the photographs and thus the court could "not find this evidence affected the jury's verdict." *Ibid.*

Significantly, the court never considered whether the introduction of the photographic evidence violated the petitioner's "constitutional rights by virtue of its being considered at the penalty phase" of his trial. *Thompson*, —— U. S., at —— n. 48 (plurality opinion). The state court's analysis is therefore fatally flawed in that it did not accord any weight whatsoever to "the qualitative difference of death from all other punishments." *California* v. *Ramos*, 463 U. S. 992, 998 (1983). As to the specific claim, moreover, the petitioner argues convincingly that the photographic evidence created an impermissible risk that his death sentence was based on considerations that are "totally irrelevant to the sentencing process," *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983), because it focused the jury's attention on the postmortem decomposition of the victim's body rather than on "the character of the [defendant] and the circumstances of the crime." *Id.*, at 879. Indeed, photographic evidence of this sort seems no less inflammatory or prejudicial than the victim impact statements deemed inadmissible in *Booth* v. *Maryland*, —— U. S. —— (1987).

The introduction in capital trials of ghastly photographs of the victim presents substantial and recurring issues of constitutional dimension, *see, e. g.*, *Tucker* v. *Kemp*, —— U. S. —— (1987) (BRENNAN, J., dissenting from denial of certiorari), that warrant plenary review by the Court. I dissent.